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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/615,249	07/08/2003	Edward L. Rapp	02280.003720.	8220
5514	7590	05/24/2005	EXAMINER	
FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112			PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 05/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/615,249

Applicant(s)

RAPP ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 April 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Double Patenting

The terminal disclaimer has been received and approved.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-13, 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly et al. (4,055,669) in view of Froseth et al. (6,592,915) and Rombauer et al., p. 708.

The hedonic score as in claim 1 of at least 5.2 is shown because the composition of Kelly can be a bar and does provide energy and nothing is seen that the bar would not have the claimed hedonic value (abstract).

A confidence level of 60% is seen to have been shown as it would inherently have this value since the product is an energy bar (abstract) as in claim 2 and acceptability since it is an energy bar and would inherently have this consumer acceptability as in claim 3 absent a showing to the contrary.

Kelly et al. disclose making a binder composition of fat, sodium caseinate (protein) and milk solids, and sugar to make a homogenous mixture, to which sensitive

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components such as vitamins and minerals, emulsifiers and colors are added at a temperature, and within a degree of mixing in a mixer that will not crush the particles as in claims 4, and 8 (col. 5, lines 54-66, col. 6, lines 29-60). The reference discloses that the blending is a critical operation that was done at temperatures from 100 to 140 F. and limited to the extent necessary to wet the added cereal particles.

The functional ingredients are seen to have been strategically positioned as they are positively mixed into the bar as in claims 5 and 9 (col. 6, lines 29-60).

The protein powder is sodium caseinate which has been rolled with other ingredients to the size of 50 microns as in claims 6 and 10. The protein powders would have had to have been about the claimed caseinate size of at least 35 microns since all the ingredients are 50 microns (col. 6, lines 38-60).

This composition would make a chewy energy bar with an acceptability of at least 4.9 due to the use of the claimed ingredients as in claim 7 (col. 6, lines 29-60).

Claims 1-13, 18-20 have been amended to require that the compositions contain particular amounts of proteins, fat, and carbohydrates in a bar containing particular amounts of calories, particular serving size and moisture content. However, particular amounts, moisture content, calories and serving sizes are seen to have been within the skill of the ordinary worker. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating

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them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Nothing is seen that the moisture content of the combined references is not within the claimed amounts (Froseth et al. (col. 26, lines 49-56). Therefore, it would have been obvious to use particular amounts of ingredients, calories, serving sizes and moisture content in the claimed compositions.

Further, Froseth et al. disclose as in claim 4 adding sensitive food ingredients to a binder (abstract and Fig. 5A and col. 4, lines 36-44, col. 14, lines 61-70). The reference discloses that flavors are added last to avoid adverse affects from too much heat (col. 13, lines 9-11). Nothing is seen that the degree of mixing affects the sensitive components. The reference is aware that various process parameters such as temperature affects the ingredients. The velocity of mixing is well known to affect ingredients, hence the settings on mixers of slow to fast. Therefore, it would have been obvious to make a composition in which the temperature and shear were controlled.

Claim 11 further requires that an energy bar matrix is made by mixing a solid component into a syrup to make a energy bar matrix, and then mixing the matrix with a

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fat-carbohydrate matrix. Rombauer et al. disclose, in the recipe Pfeffernusse, an energy matrix made of corn syrup which is combined with a solid component which is grated lemon rind, which is mixed into a fat-carbohydrate matrix, which is butter and sugar (page 708). The energy bar is seen to be lubricious since it contains fat. Also, as in In re Levin: This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to make a composition with matrixes as shown by Rombauer as required in the composition of Kelly.

Claim 12 further requires adding well-known types of candies, which contain fat and carbohydrates into the energy bar. However, nothing new is seen in adding a fat-carbohydrate mixture as in chocolate chip cookies or bars, which contain chocolate chips or in cookies which contain the large chocolate kiss (Rombauer, page 705, chocolate-chip drop cookies). Therefore, it would have been obvious to add candy

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inclusions into an energy bar matrix for their known function of adding more fat and sugar in a tasteful formulation.

Claim 13 further requires the addition of fortification ingredients. Kelly et al. disclose the addition of vitamins and minerals to the binder of that composition (col. 5, lines 40-51). Therefore, it would have been obvious to fortify as shown by Kelly et al.

The limitations of claim 18 have been disclosed above by the above combination of references which would give the hedonic gains as in claims 19 and 20. Therefore, it would have been obvious to make the composition by processing sensitive ingredients as shown by Kelly et al., and strategically positioning functional ingredients as shown by Kelly and to use a fat carbohydrate matrix as disclosed by Rombauer et al. in the process of Kelly et al. if one wanted to add more fat as shown by adding the candy inclusions of Rombauer (chocolate chips) or the fat carbohydrate matrix as shown on page 708 of Rombauer et al.

Claims 14-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Rombauer et al. (Joy of Cooking, page 708).

Claims 14 further and 16 require that an energy bar matrix is made by mixing a solid component into a syrup to make a energy bar matrix, and then mixing the matrix with a fat-carbohydrate matrix. Rombauer et al. disclose, in the recipe Pfeffernusse, an energy matrix made of corn syrup which is combined with a solid component, grated lemon rind, which is mixed into a fat-carbohydrate matrix (butter and sugar)(page 708). The composition is considered to have a lubricious mouthfeel since the claimed ingredients are used.

The composition is considered to have the claimed hedonic score as in claims 15 and 17 as the composition has been shown.

Claims 14-17 further require particular amounts of ingredients, calories and moisture content and serving size. However, In re Levin applies as above. Therefore, it would have been obvious to use particular amounts, calories and moisture contents and serving size to make an energy bar.

ARGUMENTS

Applicant's arguments filed 4-7-05 have been fully considered but they are not persuasive. Applicants argue that the amount of fat in the composition of Kelly is 11 grams. However, no patentable distinction is seen at this time in the amounts of 10 and 11 grams. Certainly, it would have been within the skill of the ordinary worker to adjust the amount of fat 1 gram particularly as the claims require "about" 2-10 grams of fat. In addition, nothing patentable is seen in the other amounts of ingredients as in the other claims, as each ingredient is used for its known function and nothing new or unobvious is seen as in In re Levin, above. The further references, which are used in combination do not have to show the whole invention. Certainly, fortification is known in the art, and it would have been obvious to fortify to any degree found necessary.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should


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you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 5-12-05


HELEN PRATT
PRIMARY EXAMINER